95-988

No. _____

Supreme Court, U.S.
FILED
DEC 20 1995
CLERK

In The

Supreme Court of the United States

October Term, 1995

WILLIAM M. MOORE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

CHARLES O. GRIGSON
Counsel of Record

GARY F. DESHAZO
114 West 7th Street
Suite 1200
Austin, Texas 78701

CHARLES O. GRIGSON
812 San Antonio, Suite 500
Austin, Texas 78701
512/477-5791

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

70 pp

QUESTIONS PRESENTED

1. Whether Congress, in adopting the 1974 amendments to Rule 16 of the Federal Rules of Criminal Procedure, intended to overrule (in part) *United States v. Nobles*, 422 U.S. 225 (1975)?

2. Whether *United States v. Mezzanatto*, 115 S.Ct. 797 (1995) requires that waivers of rights under the Federal Rules of Criminal Procedure, which are derived from the common law, be determined in accordance with common law principles?

PARTIES TO THE PROCEEDING

The parties to this proceeding are:

1. United States of America
2. William M. Moore
3. James Scott Mann, III
4. Peter K. Gallaher
5. Charles Christenson

TABLE OF CONTENTS

Page

Questions Presented i

Parties to the Proceeding ii

Table of Contents iii

Table of Authorities iv

Opinions Below 1

Jurisdiction 1

Statute Involved 1

Statement 2

A. Factual Summary 2

B. Proceedings Below 4

Reasons for Granting the Petition 7

I. The Court of Appeals' holding is erroneous and conflicts with this Court's decisions regarding the concept of waiver as applied to the work-product doctrine and the Federal Rules of Criminal Procedure 8

A. *United States v. Nobles* 9

B. *United States v. Mezzanatto* 12

Conclusion 17

Appendix A ..... App. 1

Appendix B ..... App. 17

Appendix C ..... App. 31

Appendix D ..... App. 43

Appendix E ..... App. 46

TABLE OF AUTHORITIES

Page

CASES:

Chubb Integrated Systems v. National Bank of Wash., 103 F.R.D. 52 (D. D.C. 1984) 16

Harrington v. California, 395 U.S. 250 (1969) 8

Hickman v. Taylor, 329 U.S. 495 (1947) 6, 9, 13

In re Chrysler Motors Corp. Overnight Evaluation Program Litig., 816 F.2d 844 (8th Cir. 1988) 13, 16

In re Sealed Case, 676 F.2d 793 (D.C. Cir. 1982) 13

In Re Subpoenas Duces Tecum, 738 F.2d 1367 (D.C. Cir. 1984) 13

Khandjil v. Key Stone Resorts Management, Inc., 140 F.R.D. 697 (D. Colo. 1992) 16

Republic of Philippines v. Westinghouse Electric Corp., 132 F.R.D. 384 (D. N.J. 1990), *aff'd*, 951 F.2d 1414 (3rd Cir. 1991) 13

Schultz v. Talley, 152 F.R.D. 181 (W.D. Mo. 1993) 16

United States v. Cole, 857 F.2d 971 (4th Cir. 1988) 8

United States v. Mezzanatto, ___ U.S. ___, 115 S.Ct. 797 (1995) ..... *passim*

United States v. Nobles, 422 U.S. 225 (1975) ..... *passim*

Velsicol Chemical Corp. v. Parsons, 561 F.2d 671 (7th Cir. 1977) 11

STATUTES:

18 U.S.C. § 3500 2

TABLE OF AUTHORITIES – Continued

Page

RULES:

Fed.R.Crim.P. 11 14

Fed.R.Crim.P. 16 ..... *passim*

Fed.R.Evid. 410 14

PETITION FOR A WRIT OF CERTIORARI

William M. Moore petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App., *infra*, 1a-16a) is reported at 61 F.3d 326. The district court's opinions (App., *infra*, 17a-44a) are unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on August 3, 1995. The suggestion for rehearing *en banc*, treated as a petition for rehearing, was denied on September 21, 1995. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

FED.R.CRIM.P. 16(a)(2): **Information Not Subject to Disclosure**. Except as provided in paragraphs (A), (B), (D) and (E) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government or other government agents in connection with the investigation or prosecution of the case. Nor does the rule authorize the discovery or inspection of statements made by Government witnesses or

prospective government witnesses except as provided in 18 U.S.C. § 3500. [The exceptions identified in paragraphs (A), (B), (D) and (E) of Rule 16(a)(1) are not relevant to the issues in this case].

STATEMENT

A. Factual Summary

Special agents from the Internal Revenue Service (IRS) prepared lengthy reports to aid the United States Attorney's office in the prosecution of Petitioner and his co-defendants. The charges involve complex allegations of bank fraud, misapplication of funds, and federal income tax violations. On numerous occasions the Assistant United States Attorney in charge of the prosecution permitted attorneys for Petitioner and his co-defendants to review and inspect the IRS agents' reports. Although there was no formal agreement concerning the reports among the parties, the prosecutor voluntarily disclosed the reports to the defendants. The reports were made available with the condition that they not be copied. The prosecutor disclosed the reports with the hope that once the defendants were able to review and assess the evidence contained in the reports, the defendants would choose to plead guilty.[1]

[1] From 1991 through 1993 there were numerous indictments, dismissals, re-indictments and superseding indictments involving Petitioner and his co-defendants. The timing of the indictments is not material to the issues presented here.

The reports in this case consist of approximately 250 pages of summaries of the evidence, witness statements, agents' views of the strengths and weaknesses of the case, and other material compiled in the IRS investigation. More importantly, the reports provide a guide to key documents in the case without which the defendants will be unable to review the millions of documents in the case.

Petitioner and the other defendants were permitted to review and inspect the investigative reports of the IRS agents beginning prior to the initial indictment in 1991 and continuing until mid-1992. Then an employee of counsel for a defendant was believed to be copying information from the reports by hand. From that point on counsel for all defendants, with one exception, were precluded from reviewing the reports. The prosecutor continued to allow counsel for one defendant to review and inspect the reports now claimed to be nondiscoverable because the attorney had been recently appointed to defend his client.

Trial on the merits of the case had been repeatedly delayed, mainly due to the dismissal and superseding of indictments. The events that led to the issues presented in this petition came to a head when the district court scheduled trial for early January, 1994. In June 1993 Petitioner's counsel requested a copy of the same investigative reports of the IRS agents which previously had been reviewed and inspected by Petitioner and other defense counsel. Petitioner argued that the Government had waived any right or privilege of nondisclosure afforded to the Government in Rule 16(a)(2) by voluntarily disclosing the documents to Petitioner and his co-defendants.

Thus, the critical question presented here is the same as the question presented to the trial court. Did the voluntary disclosure of the IRS agents' reports constitute a waiver of the exemption from discovery for materials not ordinarily discoverable pursuant to Rule 16(a)(2)?

B. Proceedings Below

The district court held several hearings to determine whether the Government would be required to produce the same agents' reports to which the defendants formerly had free access. The court found that the protection from disclosure of the reports provided by Rule 16(a)(2) had been waived because of the Government's prior disclosure of the reports to the defendants.

Because the prosecutor expressed concern that there was sensitive information contained in the agents' reports, the district court ordered the prosecutor to present the reports to the court for an *in camera* inspection. The prosecutor was told to indicate from the Government's point of view which documents required a protective order. The prosecutor then informed the trial court that the Government could not identify which documents required a protective order because they were intertwined with remaining documents contained in the agents' reports. Additionally, the prosecutor informed the court that the Government would not produce the IRS agents' reports, but instead would seek appellate review of the court's order requiring production. The Assistant United States Attorney informed the trial court that its choices were holding the prosecutor in contempt or dismissing the indictment.

After further hearings the district court remained convinced that the usual protections of Rule 16(a)(2) making the agents' reports nondiscoverable had been waived. The court ordered the Government to produce copies of the reports to defense counsel, subject to a protective order preventing their dissemination, or the indictment would be dismissed. When the Government refused to comply with the court's order, the district court dismissed the indictment.

The Government appealed to the Court of Appeals for the Fifth Circuit. The Court of Appeals held that the agents' reports were exempt from discovery under Rule 16(a)(2). The appellate court further found that even if Government waived the protection from disclosure, it was later "free to reassert its Rule 16(a)(2) privilege against disclosure." (App., *infra*, 15a). The Court of Appeals therefore held that the district court abused its discretion by dismissing the indictment. The district court's order was reversed and the case was remanded for trial.

The Court of Appeals stated "we do not think that *Nobles*[2] expands the attorney work product privilege to other government agent internal reports, such as those contemplated in Rule 16(a)(2)." (App., *infra*, 13a). The Court of Appeals found that "[a]s an internal government document produced by government agents in connection with the investigation of this case, the reports at issue clearly fall within the ambit of this Rule, and thus are exempted from discovery." (App., *infra*, 12a).

---

[2] *United States v. Nobles*, 422 U.S. 225 (1975).

The appellate court observed that the Advisory Committee Notes indicated that Rule 16(a)(2) was "meant to incorporate the 'work product' language of *Hickman v. Taylor*, 329 U.S. 495 (1947) into the rule to ensure that government attorneys' litigation preparations are protected from discovery." (App., *infra*, 12a). The appellate court then stated that "the Notes, however, say nothing about the work product privilege, as it is understood in *Hickman* being made applicable to the internal government documents produced by other government agents." (App., *infra*, 12a).

Thus, the Court of Appeals reasoned that because the Advisory Committee Notes did not specifically declare that the work-product doctrine is applicable to internal documents produced by other government agents, there can be no waiver under the work-product doctrine of the general rule preventing discovery of government agent internal reports.

The Court of Appeals acknowledged that the provisions of the Federal Rules of Criminal Procedure are "presumptively waivable." (App., *infra*, 13a), citing *United States v. Mezzanatto*, ___ U.S. ___, 115 S.Ct. 797 (1995). However, the Court of Appeals held that the district court erred in finding that the Government had waived the "privilege" against disclosure provided in Rule 16(a)(2) by disclosing the agents' reports to the defendants. The appellate court factually found that the defendants and their attorneys were allowed to review the reports, but not to copy them. The appellate court then found that the Government's conduct constituted a conditional waiver of the protection from discovery authorized by Rule 16(a)(2). Once the condition requiring

no copying was breached, the Government was "free to reassert its Rule 16(a)(2) privilege against disclosure". (App., *infra*, 15a).

REASONS FOR GRANTING THE PETITION

The holding of the Court of Appeals conflicts with this Court's decision and underlying reasoning in *United States v. Nobles*, 422 U.S. 225 (1975). The Court of Appeals held that disclosure of government agents' internal reports cannot under the work-product doctrine constitute a waiver of the usual exemption from discovery of agents' reports provided in Rule 16(a)(2). The Court of Appeals, although purportedly recognizing that the general rules regarding waiver are applicable to Rule 16(a)(2), misconstrued and misinterpreted this Court's holding in *United States v. Mezzanatto*, ___ U.S. ___, 115 S.Ct. 797 (1995). Without citing any authority the Court of Appeals held that there may be a "conditional" waiver of the protection from discovery afforded by Rule 16(a)(2). The appellate court held that even though there had been voluntary disclosure by the Government to defense counsel of agents' reports ordinarily exempt from discovery, the Government could refuse further disclosure of such reports upon its unilateral decision that a condition upon which the reports were disclosed had been breached. There is no provision for a "conditional" waiver in Rule 16(a)(2), the work-product doctrine, *Nobles*, *Mezzanatto*, or any case discussing the applicability of waiver to the work-product doctrine or the Federal Rules of Criminal Procedure.

This case provides an opportunity to address the relationship between Rule 16 and the work-product doctrine, an important and recurring issue in the lower courts. Moreover, the Court of Appeals erroneously decided an important issue of federal law regarding the applicability of the work-product doctrine to government agent internal reports.[3]

I. The Court of Appeals' holding is erroneous and conflicts with this Court's decisions regarding the concept of waiver as applied to the work-product doctrine and the Federal Rules of Criminal Procedure.

This Court in *United States v. Nobles, supra,* held that the work-product doctrine applies in both civil and criminal litigation. This Court also explained that the work-product doctrine applies to materials prepared by agents of the attorneys in criminal litigation. Further, the Court held that the qualified privilege derived from the work-product doctrine may be waived. In *United States v. Mezzanatto, supra,* this Court determined that, barring an express exception, virtually all provisions of the Federal Rules of Criminal Procedure may be waived.

---

[3] The issues raised in this petition deal with documents requested by Petitioner and his co-defendants prior to trial. Once Petitioner's case is tried, the appellate courts will review these issues only if there is a conviction, and then only to determine whether the failure to provide the IRS agents' reports was harmless error. *See generally Harrington v. California,* 395 U.S. 250 (1969); *United States v. Cole,* 857 F.2d 971 (4th Cir. 1988).

The Government's voluntary disclosure of the IRS agents' reports to defense counsel in this case waived any protection from nondisclosure afforded the Government by either the work-product doctrine or Rule 16(a)(2). To hold otherwise is to disregard the holdings and the underlying rationale of *Nobles* and *Mezzanatto*.

A. *United States v. Nobles*

What is now known as the work-product doctrine was first recognized by this Court in *Hickman v. Taylor*, 329 U.S. 495 (1947). Simply stated, this Court ruled that materials prepared by an attorney in anticipation of and preparation for litigation generally would not be discoverable by opposing parties or counsel. *Id.* at 508.

In *United States v. Nobles, supra*, this Court decided that although the work-product doctrine is more frequently asserted to bar discovery in civil litigation "its role in assuring the proper functioning of the criminal justice system is even more vital." *Id.* at 239.

In *Nobles* defense counsel used an investigator to obtain statements from prosecution witnesses. Defense counsel used the investigator's report in his cross-examination of the witnesses. Later the defense counsel indicated his intent to call the investigator as a defense witness to impeach the prosecution witnesses interviewed by the investigator. The trial court ordered that the investigator be prevented from testifying unless the defense produced an edited version of the investigator's report to the prosecutor. This Court held that by choosing to present the investigator as a defense witness the defendant had waived the privilege derived from the work-

product doctrine with respect to those portions of the investigator's report about which he testified.

The investigator's report in *Nobles* was deemed discoverable at trial rather during pre-trial discovery. Nevertheless, it was the disclosure and use of the report by defense counsel that constituted a waiver of what normally would be non-discoverable work-product material. This Court's decision did not rest on whether the report was disclosed at trial or during pre-trial.

The Court of Appeals in this case erroneously held that *Nobles* was not applicable and thus the work-product doctrine could not "cover documents made expressly non-discoverable in Rule 16(a)(2)." (App., *infra*, 12a). The appellate court additionally noted as if it made a difference that "*Nobles* was concerned only with the *defendant's* work product." *Id.* The Court of Appeals incorrectly held that Government agent internal reports do not fall within the work-product "privilege." The appellate court stated:

> In short, we do not think that *Nobles* expands the attorney work product privilege to other government agent internal reports, such as those contemplated in Rule 16(a)(2).

(App., *infra*, 13a).

The holding of the Court of Appeals was based on an illogical interpretation of the Advisory Committee Notes for Rule 16. These Notes, according to the Court of Appeals, make the work-product exemption from discovery applicable only to materials prepared by Government attorneys. The Court of Appeals incorrectly reasoned that since there is no specific statement in the Advisory Committee Notes that the work-product doctrine is applicable

to internal documents produced by other government agents, then the IRS agents' internal reports in this case could not constitute work-product.

The Court of Appeals' holding is contradictory to the reasoning and rationale in *Nobles*. The reports in *Nobles* were prepared by an investigator for an attorney in anticipation of litigation. The IRS agents' reports in this case were prepared by the IRS agents in anticipation of litigation. The documents in both cases are work-product materials.

In *Nobles* this Court mentioned that "[a]t its core, the work-product doctrine shelters the mental processes of an attorney. . . . " *Nobles, supra,* at 239. This Court also stated the following:

> . . . the doctrine is an intensely practical one, grounded in the realities of litigation in our adversary system. One of those realities is that attorneys often must rely on the assistance of investigators and other agents in the compilation of materials in preparation for trial. *It is therefore necessary that the doctrine protect material prepared by agents for the attorney as well as those prepared by the attorney himself.*

Id. at 239-240. [Emphasis added].

Moreover, in footnote 13 of *Nobles* this Court indicated that Rule 16 embodies the common law work-product doctrine, including the portion of that doctrine protecting material prepared by non-attorneys. Numerous Courts of Appeals have also adopted that view. *See, e.g., Velsicol Chemical Corp. v. Parsons,* 561 F.2d 671 (7th Cir. 1977). The Court of Appeals, however, held that in adopting the 1974 amendments Congress created a

set of protections – for material prepared by agents of attorneys – that went *beyond* the traditional work-product protection. The Court of Appeals' decision thus conflicts with *Nobles* and raises the question whether *Nobles* remains good law.

B. *United States v. Mezzanatto*

The Court of Appeals correctly held that in most circumstances Rule 16(a)(2) exempts the IRS agents' reports in question from discovery. The pertinent provision of Rule 16(a)(2) provides as follows:

> . . . this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government or other government agents in connection with the investigation or prosecution of the case.

Fed.R.Crim.P. 16(a)(2).

After quoting the above provision from Rule 16 the Court of Appeals stated:

> As an internal document produced by government agents in connection with the investigation of this case, the reports at issue clearly fall within the ambit of this Rule and, thus are exempted from discovery.

(App., *infra*, 12a). The Court of Appeals acknowledged that this Court held in *United States v. Mezzanatto*, *supra*, that all provisions of the Federal Rules of Criminal Procedure, including Rule 16, are presumptively waivable.

The Court of Appeals was wrong to hold that the work-product doctrine is not applicable to the IRS agents'

reports. It compounded the wrong by holding that the Government did not waive the Rule 16(a)(2) exemption from discovery for these reports after the reports were disclosed on numerous occasions to defense counsel. Moreover, the Court of Appeals invented the notion of a "conditional" waiver to justify its holding that even if the Government waived the exemption from discovery for the agents' reports, the Government was free to reassert the exemption at its discretion.

This Court held in *Hickman v. Taylor, supra,* and numerous courts have since held, that the work-product doctrine exists to protect the adversary system. Protection afforded by the work-product doctrine is therefore not instantly waived once confidential work-product documents are disclosed, but rather only if such disclosure runs counter to the principles embodied by the adversary system. *See e.g. In re Subpoenas Duces Tecum,* 738 F.2d 1367 (D.C.Cir. 1984); *In re Sealed Case,* 676 F.2d 793 (D.C. Cir. 1982). Once a party voluntarily provides an adversary with materials protected by the work-product doctrine, the protections afforded by the work-product doctrine are destroyed. *In re Chrysler Motors Corp. Overnight Evaluation Program Litig.,* 860 F.2d 844 (8th Cir. 1988); *Republic of Philippines v. Westinghouse Electric Corp.,* 132 F.R.D. 384 (D. N.J. 1990), *aff'd,* 951 F.2d 1414 (3rd Cir. 1991).

After the Court of Appeals' implausible holding that the IRS agents' reports did not constitute materials within the work-product doctrine, it addressed the general rules regarding a possible waiver of the Federal Rules of Criminal Procedure. There is no basis for the Government to argue, nor did the Court of Appeals hold, that Rule

16(a)(2) "depart[s] from the presumption of waivability." *United States v. Mezzanatto, supra,* at 803.

In *Mezzanatto* this Court examined at length numerous constitutional and procedural rights that are waivable. At trial the defendant in *Mezzanatto* sought to exclude the use of inconsistent statements he made during plea discussions in the Government's cross-examination of him. This Court held that despite Rule 11(e)(6) of the Federal Rules of Criminal Procedure and Federal Rule of Evidence 410, which exclude statements made during plea bargaining, the defendant had agreed to waive the protective provisions of these procedural and evidentiary rules. Since the defendant voluntarily chose to waive the protective provisions of the rules that prohibited use of his statements made in plea negotiations, this Court held that the defendant's waiver could not be withdrawn. Use at trial of the defendant's statements made in plea discussions was therefore permitted.

Here the Government disclosed documents ordinarily protected from discovery by Rule 16(a)(2) in an attempt to encourage pleas of guilty. After it became apparent that the defendants would not plead guilty, the Government withheld the same IRS agents' reports it had previously authorized defense counsel to inspect and review. The Government argued that its basis for doing so was because one of the defense counsel's law clerks was attempting to copy information from the reports by hand.

This Court refused to allow the defendant in *Mezzanatto* to reassert the protections of Federal Rules of Evidence 410 and Rule 11(e)(6) because of his voluntary

waiver of those rules. Likewise, this Court should not allow the Government here to reassert the protections of Rule 16(a)(2) which ordinarily exempt the IRS agents' reports from discovery. The defendant's waiver in *Mezzanatto* was voluntary. The Government's waiver in this case was voluntary. The result should be no different.

The holding of the Court of Appeals that the Government could waive the protections of Rule 16(a)(2) "conditionally" is erroneous. No support can be found for this theory in cases, statutes, or treatises. The Court of Appeals seems to imply that there was a contract between the Government and defense counsel allowing defendants to review and inspect the IRS agents' reports, but not copy them. Assuming that defense counsel breached the contract, the Court of Appeals permitted the Government to reassert that the agents' reports were not discoverable under Rule 16(a)(2).

Even the Court of Appeals recognized that there was no *formal* agreement among the parties concerning the reports. More importantly, the prosecutor, for strategic reasons, knowingly and voluntarily disclosed the information contained in the agents' reports to the defendants, and then, for additional strategic reasons, changed his mind. Such game playing, however, is entirely unwarranted, even accepting the Court of Appeals' characterization of the "agreement" among the parties. That agreement did not concern the *confidentiality* of information in the reports, but instead imposed certain conditions on the post-disclosure *use* (*i.e.*, copying) of that information. To describe the alleged agreement as a "confidentiality" agreement would be absurd.

The holding by the Court of Appeals is inconsistent with common law concepts of waiver. A waiver occurred in this case. The Government voluntarily disclosed the IRS agents' reports to its adversaries. As one court has held:

> a waiver of the privilege occurs despite any agreement between the parties to keep the information confidential. Such an agreement does not alter the fact that the work-product doctrine has been breached voluntarily.

Khandjil v. Key Stone Resorts Management, Inc., 140 F.R.D. 697, 700 (D. Colo. 1992). *See also Chubb Integrated Systems v. National Bank of Wash.*, 103 F.R.D. 52, 67 (D. D.C. 1984). Virtually all courts have consistently held that voluntary disclosure of work-product material to an adversary waives the work-product protection with respect to the items actually disclosed. Many courts have held that there is a waiver even if the disclosure occurs during settlement negotiations or under a confidentiality agreement. *In re Chrysler Motors Corp. Overnight Evaluation*, 860 F.2d 844, 846 (8th Cir. 1988); *Schultz v. Talley*, 152 F.R.D. 181 (W.D. Mo. 1993).

In *Mezzanatto* this Court indicated that waivers of rights under the Federal Rules of Criminal Procedure should be determined by the application of common law principles. *See, e.g., Mezzanatto*, 115 S.Ct. at 802. The Court of Appeals, however, in interpreting Rule 16, adopted a rule inconsistent with the common law principle by holding that the Government could reassert the work-product "privilege" after disclosing information to an adversary. The decision of the Court of Appeals thus conflicts with the reasoning in *Mezzanatto*, and raises the

question whether the interpretive principle articulated in *Mezzanatto* applies to Rule 16.

In summary, this Court should grant this petition to correct three erroneous holdings of the Court of Appeals. First, the Court of Appeals incorrectly held that IRS agents' reports cannot be work-product material. Second, the appellate court failed to acknowledge that the Government's voluntary disclosure of the IRS agents' reports constituted a waiver of the protections ordinarily afforded the reports by Rule 16(a)(2). Finally, the Court improperly held that even after the Government waived the protection from discovery under Rule 16(a)(2), it was free to reassert the protection of the rule to prevent discovery of the exact materials that already had been disclosed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

CHARLES O. GRIGSON
Counsel of Record

GARY F. DESHAZO
114 West 7th Street
Suite 1200
Austin, Texas 78701

CHARLES O. GRIGSON
812 San Antonio, Suite 500
Austin, Texas 78701
512/477-5791

Counsel for Petitioner

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-50082

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

versus

JAMES SCOTT MANN, III, PETER K. GALLAHER, WILLIAM M. MOORE, JULIAN C. ALSUP, and CHARLES CHRISTENSEN,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Texas

(Filed Aug. 3, 1995)

Before VAN GRAAFEILAND,* JOLLY, and WIENER, Circuit Judges. E. GRADY JOLLY, Circuit Judge:

The district court dismissed the indictment in this case because, after several delays in bringing the case to trial, the government failed to comply with the district court's order to disclose documents. The government had allowed the defendants access to the documents upon a non-copying condition, but withdrew access when they discovered that the defendants were copying the documents. We hold that the documents were privileged against disclosure under Fed. R. Crim. P. 16(a) (2), and

* Circuit Judge of the Second Circuit, sitting by designation.

although the government may have conditionally waived its privilege, the defendants breached the agreement. The government, therefore, had the right to reassert its privilege against disclosure. Thus, because the government properly exercised its privilege against disclosure under Rule 16(a) (2), the district court abused its discretion when it dismissed the indictment. Consequently, we reverse the district court's dismissal of the indictment, and remand the case.

I

This case has its genesis in the 1980s, during which time the defendants were involved in a series of allegedly fraudulent transactions regarding the sale of a Texas savings and loan institution and the exchange of certain parcels of real estate. The main focus of this appeal and our attention today, however, is on the pretrial investigation and the discovery that began shortly before most of the defendants were initially indicted in September 1991, and continued until shortly before the district court's dismissal of the third superseding indictment in January 1994. We now turn to examine the events shaping this controversy in greater detail.

This case has involved a series of indictments, dismissals, and reindictments, which evidence the complex nature of the case against the defendants, and which contributed to the frustration of the district court. In September 1991, the grand jury returned a twelve-count indictment charging Peter K. Gallaher, William M. Moore,

Charles M. Christensen, and Julian C. Alsup[1] with filing false corporate tax returns in violation of 26 U.S.C. § 7206(1),(2) from 1984 through 1990. The district court set trial for April 20, 1992. The following January, the case was reassigned to the Honorable Sam Sparks. In response to motions for continuance by defendants Alsup and Christensen and in anticipation of a superseding indictment, the district court set trial for July 6, 1992. As anticipated, the grand jury returned a superseding indictment in April that added appellee J. Scott Mann to the case and included additional charges of fraud and conspiracy in connection with a failed savings and loan association, in violation of 18 U.S.C. § 371. After three parties moved for a continuance, the district court rescheduled the trial for August 17, 1992. On August 5, however, the government dismissed the superseding indictment. At that time, the grand jury returned a new indictment, which contained only three counts and charged only Mann with tax related offenses.[2] Mann's trial on these charges was subsequently set for November 1992, with the Honorable James R. Nowlin presiding. On October 22, Mann's case was reassigned to Judge Sparks. At a hearing on November 5, Judge Sparks allowed Mann

---

[1] The case against Alsup was severed by the district court on the same day in January 1994 that the court dismissed the final superseding indictment against the other parties. Alsup, therefore, is not a party to this appeal.

[2] Mann was charged with violations of 26 U.S.C. § 7206(1) (false corporate tax return), 26 U.S.C. § 7203 (failure to file a corporate tax return), and 26 U.S.C. § 7206(1) (false personal income tax return).

to substitute his counsel and was informed by the government that it was seeking another superseding indictment. Subsequently, the court granted Mann's motion for a continuance, rescheduling the trial for December 21. At a December 11 motions hearing, the government informed the court that it was still working on the superseding indictment. On December 18, Mann's counsel filed a motion for a continuance to allow him more time to examine the evidence. On December 22, the court granted Mann's motion for continuance, and set the case for trial on March 1, 1993. On February 24, 1993, the district court filed an amended order, rescheduling the trial for March 29, 1993. At docket call on March 1, the government told the court that it was still pursuing a superseding indictment, expected by July. On March 11, the district court entered an order rescheduling Mann's trial for July 5 because his counsel needed additional time to prepare his defense. On June 30, the grand jury issued the thirty-nine count superseding indictment that is the subject of this appeal.[3] After a discovery motion hearing on September 24, 1993, the court set the trial date as January 4, 1994.

---

[3] The indictment charged all the defendants, Gallaher, Moore, Alsup, Christensen, and Mann with thirty-nine counts based upon the following code violations: (1) 18 U.S.C. § 371 (conspiracy to defraud a savings and loan, the Federal Home Loan Bank Board, and the Internal Revenue Service); (2) 18 U.S.C. § 1006 (false entries in savings books); (3) 18 U.S.C. § 1014 (false statements to banks); (4) 26 U.S.C. § 7206 (false tax returns); (5) 18 U.S.C. § 657 (misapplication of savings funds); (6) 18 U.S.C. § 1006 (fraudulent participation in savings transactions); (7) 18 U.S.C. § 215(a) (receipt of commission for procuring loan); and (8) 26 U.S.C. § 7203 (willful failure to file tax return).

In the meantime, plea negotiations were ongoing. Before the first indictment had issued in September 1991, the government had met with the defendants and their attorneys on several occasions to discuss the case. As a part of these discussions, the government had allowed the defendants to inspect portions of government agents' reports[4] that included assessments of the strength of the case, and that were otherwise not discoverable under Rule 16(a) (2). In addition to the exposure of these documents, Agent Mazur copied approximately 150 pages of his report, termed the "evidence" or "factual" section and placed it on file with the government's other evidence to which the defendants were given access in order to allow the defendants to better understand the cases against them. Apparently, a portion of Agent Brooks's report was also deposited with the government's evidence, composed of hundreds of volumes of materials.

Although the record does not contain a formal agreement governing access to these documents and the agents' reports, the record reflects that early in the discovery process certain "rules of engagement" were established. The district court was aware of these rules because on several occasions the government referenced these informal rules in its pleadings and correspondence. For instance, in its January 24, 1992 Response to Pretrial Motions Filed by Defendant William Moore, the government stated that it had

> agreed to informally provide all discovery to which Defendant Moore is entitled pursuant to

---

[4] These were the reports of the Internal Revenue Service's Special Agents Walter Mazur and Howard Brooks.

> the Federal Rules of Criminal Procedure and the laws and Constitution of the United States. Further, the government has informally agreed to provide discovery of materials to which Defendant Moore is not entitled under the above cited authorities.

Supplemental Record on Appeal, Vol. I, at 103. In its January 24, 1992 Response to Pretrial Motions Filed by Defendant Peter Gallaher, the government states that "[i]t is the policy of the prosecutor assigned to this case to facilitate discovery whenever possible. To that end, counsel for Mr. Gallaher . . . has been allowed to examine the Special Agent's report prepared by Walter Mazur of the Internal Revenue Service." *Id.* at 105.

In other pleadings, the government was more specific as to the parameters of the rules, using the same language to describe access to the materials on two different occasions:

> [t]he government will voluntarily allow all defendants in this cause to examine and copy evidence which the government has accumulated during its investigation. The only exceptions are items submitted to the government with a reservation of the attorney-client privilege. Counsel for the defendants may examine the government's files at the Federal Building, 300 East 8th Street, Austin, Texas. The files are in the custody of Walter Mazur, Special Agent, Internal Revenue Service, Criminal Investigation Division. . . . A copier is available to the defendants' attorneys. A fee of 10 cents per page will be charged.
>
> The government has previously allowed attorneys to examine Agent Mazur's report. The

> government will continue to allow counsel to *review* the factual portion of the report, but the report *may not be copied and must remain on government premises at 300 East Eighth Street, Austin, Texas.*

May 13, 1992 Response to Pre-Trial Motions Filed by Defendants Mann and Gallaher, Supplemental Record on Appeal, Vol. II, at 274-75 (emphasis added); June 9, 1992 Response to Pre-Trial Motions Filed by Defendant Christensen, Supplemental Record on Appeal, Vol. II, at 421-22 (emphasis added). Moreover, early in the discovery process, the government orally told the court that it was giving the defendants restricted access to portions of the special agents' reports. In a June 10, 1992 pretrial motion hearing, the government stated that

> we have given the attorneys access to Mr. Mazur's investigative reports. . . . We *intend* to give the attorneys access throughout [the discovery process] to the factual portions of that report. Now there's some theory and that sort of thing in there that we are going to hold back, but the factual portions that will lead them into the evidence, that the government has accumulated, will remain open to them.

Record on Appeal, Vol. V at 12 (emphasis added).

As the record reflects, the defendants were allowed to examine the evidence portion of the investigative reports, but specifically were prohibited from copying these reports. Up to July 1992, the defendants had access to these investigative reports, as well as documentary evidence in the basement of the federal government

building in Austin, Texas. On July 6, however, the government discovered a representative of one of the defendants hand-copying verbatim from the evidence portion of one of the reports, in direct contravention to the informal rules of access established for the documents. This act prompted the government to deny access to the agents' reports to all defendants in the case.[5] The government, nevertheless, continued to offer access to the other documents involved in the case. Apparently, the defendants did not raise an immediate objection to this denial of access.

On August 4, 1992, the indictment under which this discovery had been proceeding was voluntarily dismissed by the government. A superseding indictment against only Mann was issued in mid-August[6] so that Gallaher, Moore, Alsup, and Christensen, at that point, were no longer involved in discovery. The government allowed Mann to have access to government documents, but withheld access to the special agents' reports. The record does not reflect that Mann expressed any objection to this denial of access.

On June 30, 1993, almost one year later, the government obtained the superseding indictment that is at issue

---

[5] The government, however, made an exception to this rule for Gallaher's substituted counsel, whom the court had appointed on July 30, 1993, to replace previous counsel. Because the counsel came into the case late, the government gave him access to the special agents' reports on several occasions so that he could understand the nature of the government's case. The government also made clear to him that it would not allow the reports to be copied.

[6] *See* Note 2 *supra*.

in this case. See Note 3 *supra*. In connection with this indictment, the government continued to practice the open discovery policy it had previously employed with these defendants. The government agent reports, however, were not among the documents to which the defendants were given access.

On October 5, 1993, over one year after access to the government agents' reports was curtailed, appellee Moore filed a motion for discovery, inspection, and copying of exculpatory evidence, in an effort to obtain the investigative reports. Moore contended that the government had waived any privilege by disclosing the reports during earlier plea negotiations. After a hearing on November 19, the district court found that the government, "by appropriately cooperating with defense counsel in the discovery process, has allowed the defendants' counsel to inspect the notebook and therefore has waived any work product privilege." Thus, the district court granted Moore's motion on November 24 and ordered the government to present the reports for an *in camera* inspection so that the court could determine what parts of the agents, reports, if any, could be redacted pursuant to a protective order. When the government tendered the reports to the court on December 10 for the inspection, it asked the court to reconsider its disclosure order, reminding the court that Fed. R. Crim. P. 16(a) (2) specifically makes these reports undiscoverable. On December 17, the court held another hearing and orally denied the government's motion for reconsideration. As a result, the court again ordered the government to disclose the agents' reports because the previous disclosures had been inconsistent with the government's work product privilege,

even though the government had argued that these documents were exempt from disclosure under Rule 16(a) (2). The court then scheduled an evidentiary hearing for December 28 to determine which documents had been disclosed. After this hearing, rather than consider the alternative of holding the government in contempt, the district court entered an order on December 29 requiring the government to produce the reports, having stated in the hearing that even if there were rules governing access to the documents, the government had waived any privilege it had to the documents. *See* Record at Vol. XII, p. 97. The court also warned that it would dismiss the indictment if the government did not comply with its order. The government did not comply, and the court dismissed the indictment on January 3, 1994. This appeal followed.

II

The parties raise three issues on appeal. All of the appellees, except Gallaher, first contend that this court is without jurisdiction to hear this appeal. The government, as appellant, presents two contentions: first, it contends that the district court erred in ordering the government to provide the defendants with copies of the special agents' reports that were exempt from pretrial discovery under Fed. R. Crim. P. 16(a) (2); second, it argues that the district court abused its discretion in dismissing the indictment based on the government's refusal to provide copies of the agents' reports to the defendants.

We will address each issue in turn.

III

A

We first must address the defendants' argument that this court does not have appellate jurisdiction over this matter. This argument plainly lacks merit. This appeal is authorized by 18 U.S.C. § 3731, which permits the government to appeal from "an order of a district court dismissing an indictment," providing, however, "no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution." The defendants argue that the double jeopardy clause prohibits this appeal. The defendants concede, as they must, that jeopardy has not attached because a jury has not yet been empaneled and sworn. *See United States v. Juarez-Fierro*, 935 F.2d 672, 675 (5th Cir. 1991). They cite no authority in support of their argument, but urge this court to adopt a functional approach to double jeopardy analysis. As stated above, this argument has no merit. Accordingly, because the government's appeal is authorized by § 3731, we have appellate jurisdiction.

B

Now let us determine whether the district court erred when it ordered the government to produce documents in question. We review the district court's actions in this discovery setting for an abuse of discretion. *United States v. Sarcinelli*, 667 F.2d 5 (5th Cir. 1982).

We begin with an examination of the plain language of Rule 16(a) (2). Under the heading, "Information Not Subject to Disclosure," Rule 16(a) (2) states that, with exceptions not relevant here, "this rule does not authorize

the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government or *other government agents* in connection with the investigation or prosecution of the case." (Emphasis added). As an internal government document produced by government agents in connection with the investigation of this case, the reports at issue clearly fall within the ambit of this rule, and thus are exempted from discovery.

The Advisory Committee Notes cast more light on the purpose of the rule. The 1974 Amendment Notes state that the phrase "reports, memoranda, or other internal government documents made by the attorney for the government" was meant to incorporate the "work product" language of *Hickman v. Taylor*, 329 U.S. 495 (1947), into the rule to ensure that government attorneys' litigation preparations are protected from discovery. The Notes, however, say nothing about the work product privilege, as it is understood in Hickman, being made applicable to the internal government documents produced by other government agents.

The defendants argue that *United States v. Nobles*, 422 U.S. 225 (1975), made the work product privilege fully applicable to criminal cases, and, thus, its waiver rules apply here. It is true that the work product privilege does apply in criminal cases. We disagree, however, with the defendants' characterization of the extent to which *Nobles* expands this privilege to cover documents made expressly non-discoverable in Rule 16(a) (2). *Nobles* was concerned only with the *defendant's* work product. The scope of pre-trial discoverability of internal government documents, as set forth in Rule 16, was not at issue. Put

another way, *Nobles*, which was not concerned with Rule 16(a) (2), cannot be read to alter the plain language of a rule it did not address. We should further observe that at the time of the *Nobles* decision, the work product language that the defendants assert to support their argument had not yet been incorporated into Rule 16(a) (2). In short, we do not think that *Nobles* expands the attorney work product privilege to other government agent internal reports, such as those contemplated in Rule 16(a) (2).

Although we decline to extend the rules of the waiver of attorney work product privilege to the context of the case before us, we find that the general rules regarding waiver are applicable. *See United States v. Mezzanatto*, 115 S.Ct. 797, 801-02 (1995) (The provisions of the Federal Rules of Criminal Procedure are "presumptively waivable" by a voluntary agreement of the parties.). "A waiver is a voluntary and intentional relinquishment of a known right or conduct that warrants an inference of such a relinquishment." *Highlands Ins. Co. v. Allstate Ins. Co.*, 688 F.2d 398, 404 (5th Cir. 1982); *see also Birdwell v. Skeen*, 983 F.2d 1332, 1340 (5th Cir. 1993). Rule 16(a) (2) clearly exempts certain types of government materials from discovery, with the reports at issue being among them. The defendants argue that when the government allowed them to inspect the agents' reports, it waived the privilege against disclosure. The district court agreed and found that notwithstanding the establishment of any conditions governing the access to the special agents' reports, the government waived the privilege of non-discoverability upon once disclosing the reports to the defendants. After looking at the general principles of

waiver and the government's conduct in this proceeding, we conclude that the district court erred.

From the very first, the government put certain conditions on the defendants' access to these reports. During plea negotiations in 1991, the government attorneys and special agents were present when the defendants and their attorneys reviewed the reports. Furthermore, the defendants were only given access to a portion of the reports. Although other documents were allowed to be copied, with the government even providing a copying machine, the government made clear that these reports, which are indeed protected by Rule 16(a) (2), could not be copied.[7] Moreover, along with other documents, the government controlled the access to the reports and would not allow the parties to transport them from government facilities. From the start, the defendants agreed to the terms of this restrictive arrangement. So long as the defendants complied, the government permitted access. Only when the government discovered one of the parties hand-copying, verbatim, from the reports did it withdraw the restricted access to these reports that it had granted earlier. In the light of these facts, we conclude that, even assuming the government's conduct satisfies the principles of waiver generally, the government did not waive its Rule 16(a) (2) privilege absolutely. Instead, it waived

---

[7] The defendants argue that the government's rules governing the copying of the reports are ambiguous. They assert that the rules are susceptible to an interpretation allowing hand-copying, but disallowing photocopying. We reject this argument out of hand. The plain language of the correspondence from the government disallows "copying," which would include any manner of reproduction.

the rule's protections conditionally; that is, the government agreed to suspend Rule 16(a) (2) so long as the defendants did not copy the privileged materials. When this condition was breached, however, the obligation of the government terminated, the parties returned to the *status quo ante*, and the government was, therefore, free to reassert its Rule 16(a) (2) privilege against disclosure.

Although this particular question of waiver has seldom been addressed, courts that have been confronted with a Rule 16(a) (2) question have read the rule to prohibit forced disclosure of this type of government work product. *See United States v. Lov-It Creamery, Inc.*, 704 F.Supp. 1532 (E.D. Wisc. 1989); *see also United States v. Williams*, 998 F.2d 258, 268 n.23 (5th Cir. 1993) ("[Rule 16(a)(2)] specifically provides that 'internal' memoranda and reports prepared by the government in the preparation of its case are not discoverable."). Furthermore, other courts have recognized the binding power of these informal discovery agreements. *See United States v. Cole*, 857 F.2d 971, 976 (4th Cir. 1988). Other cases have held that although the government allowed defendants to view certain documents covered by Rule 16(a) (2), or a similar state rule, no waiver of the privilege against disclosure occurred. *See United States v. Penix*, 516 F.Supp. 248 (W.D. Okla. 1981); *Indiana ex rel. Keaton v. Circuit Court of Rush County*, 475 N.E. 2d 1146 (Ind. 1985).

C

Finally, in the light of our opinion above, the district court's error in dismissal of the indictment is now self-evident, considering our conclusion that the government

did not waive absolutely its Rule 16(a) (2) privilege against nondisclosure. Because we hold that the government acted within its Rule 16(a) (2) protections, the court was without the power to impose the extreme penalty of dismissal of the indictment. Consequently, the district court abused its discretion, and the order of dismissal must be reversed.

IV

To sum up, we hold that we have jurisdiction to entertain this appeal. Furthermore, we hold that the government properly asserted its privilege against disclosure under Rule 16(a) (2). Thus, the district court abused its discretion when it ordered a dismissal of the indictment.[8] For the foregoing reasons, the district court's order dismissing the indictment is

REVERSED and REMANDED.

---

[8] When the district court dismissed the indictment, it also noted that the government had engaged in other unjustifiable delay. The court further indicated that this background of additional delay had influenced its decision to dismiss the indictment. It is nevertheless clear, however, that only the added factor of the government's refusal to disclose moved the judge actually to dismiss the indictment. No record was made that would allow us to review the court's finding of fault against the government for other delays encountered during the case. Thus, the only issue we decide in this appeal is that the district court erred by dismissing the indictment based on the government's failure to disclose the agents' reports. This opinion does not affect the right of the district court to reconsider on remand any other alleged misconduct on the part of the government and, if justified, to take appropriate action.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UNITED STATES OF AMERICA,	§	
	§	
Plaintiff,	§	NO. A 92 CR 129
	§	(1-5) SS
vs.	§	
PETER KINIMONTH GALLAHER,	§	
WILLIAM MARVIN MOORE,	§	
JULIAN CLIFFORD ALSUP,	§	
CHARLES MARCH CHRISTENSEN,	§	
JAMES SCOTT MANN, III,	§	
	§	
Defendants.	§	

ORDER

(Filed Dec. 20, 1993)

Before the Court is the government's "Motion for Reconsideration of Order Directing Disclosure of Special Agents' Reports."[1] Having considered the motion, the evidence presented, and the arguments of counsel, the Court enters the following findings and order.

---

[1] The "special agents' reports" referred to in the title of the government's motion were originally referred to as the government's "Trial Notebook." The government now describes the documents as special agents' reports.

I. Background

The issue raised by this motion has been before the Court in the some [sic] form in the last three pretrial motions hearings the Court had held on this cause. The Court, therefore, provides the following background pertinent to the motion now before the Court.

At a pretrial hearing on September 24, 1993, the Court addressed Defendant Moore's discovery motion that included a request for production of "[t]he three ring "Trial Notebook" believed to have been prepared by the I.R.S./F.B.I. for the United States Attorney and previously made available in June, 1992 to Defendant William Moore." *See* Motion by Defendant William Moore for Discovery and Inspection and Demand for Exculpatory Evidence, at 13. Defense counsel represented that he was tendered a "trial notebook" at the United States Attorney's office and allowed to review it and take notes there. He asserted, however, this was an inefficient process and he desired copies of the documents. The Assistant United States Attorney stated the notebook was work product and, while he disclosed it to defense counsel, he did not have to provide defense counsel with a copy because it was not discoverable. The Assistant United States Attorney also represented the notebook contained the case agent's work product – reports consisting of the agent's accumulation of evidence and subjective notes about the case, as well as confidential information relating to third parties not relevant to the indictment in this cause. *See* Sept. 24, 1993 Hearing Transcript, at 15. Accordingly, the Assistant United States Attorney expressed concern about widespread release of information of a sensitive and confidential nature. The Assistant United States Attorney

stated he had "let everybody look at" the notebook "in an effort to get them in the case and to understand what we are doing."[2] *Id.* The Assistant United States Attorney stated he had ended the practice of allowing defense counsel to view the notebook when law clerks associated with defense counsel began copying verbatim from the notebook. *Id.* at 16. The Court, in an effort to resolve the discovery dispute in a mutually satisfactory manner, dismissed Defendant Moore's motion without prejudice but stated defense counsel could inspect the book at the U.S. Attorney's offices. *Id.; see also* Court's Sept. 27, 1993 Order.

The issue of the notebook was again raised by Defendant Moore in his Motion for Discovery and Inspection and Copying of Exculpatory Evidence (Government's Trial Notebook), which was filed October 5, 1993. Defendant Moore again represented to the Court that the notebook had been shown to defense counsel, and accordingly, any work-product privilege had been waived by the government. At this time, the government represented to the Court that actually two notebooks were actually at issue. Upon the Court's oral ruling granting Moore's motion, the government re-urged its concern

---

[2] The Assistant United States Attorney now represents the compilation of documents is two separate case agents' reports that are not discoverable or subject to waiver of the work-product privilege. Additionally, the Assistant United States Attorney now disclaims all counsel were provided access to the compilation of documents at his office. He suggests only counsel for Moore and Gallaher reviewed the documents and only certain documents were made available. *See* Letter from Blankinship to Sparks, Dec. 17, 1993.

about the sensitive and confidential nature of information regarding third parties contained in the notebooks. The Court instructed the government to present the notebooks to the Court for *in camera* inspection with a list or designation of the portions containing sensitive information so the Court could determine which portions, if any, should be redacted and what type of protective order should be issued.

By order signed November 23, 1993, the Court granted Defendant Moore's motion.[3] The Court also set a final pretrial motions hearing for December 17, 1993, to take care of any pending pretrial issues. The government presented the notebooks to the Court late on the afternoon of Friday, December 10, 1993.[4] At that time, the

---

[3] The Court's order states:

> Defendant Moore's Motion for Discovery and Inspection and Copying of Exculpatory Evidence (Government's Trial Notebook) is GRANTED subject to the following procedure. The Government, by appropriately cooperating with defense counsel in the discovery process, has allowed the Defendants' counsel to inspect the notebook and, therefore, has waived any work-product privilege. However, many of the records in the notebook, which contain information related to third parties and speculation on behalf of government agents regarding third parties, require protection. Therefore, IT IS ORDERED that the United States Attorney present the notebook with an indication of the documents that require a protective order to the Court for *in camera* inspection before the notebook is presented to the Defendants' counsel for copying.

[4] One notebook contains the report of Special Agent Mazur in conjunction with his investigation of the five defendants. The

Assistant United States Attorney represented that providing the Court with the requested list or designation was an impossible task because much of the information was so closely intertwined and interrelated. The Court, therefore, requested the Assistant United States Attorney to draft an appropriate protective order to be entered at the time of disclosure.

The government also filed its Motion for Reconsideration of Order Directing Disclosure of Special Agents' Reports on December 10, 1993, in which it expressly alleges the notebooks have been mischaracterized as trial notebooks but are, in fact, case agents reports exempt from disclosure under Federal Rule of Criminal Procedure 16(a)(2). In the pretrial hearing on December 17, 1993, the government again stated that defense counsel had been allowed to review the contents of the notebooks in the offices of the United States Attorney.

In open court on December 17, 1993, the Court orally denied the government's motion for reconsideration. Thereafter, the Assistant United States Attorney represented to the Court the government respectfully would decline to produce the two notebooks and would seek appellate review of the Court's ruling. The Court, faced with a trial date of January 4, 1994, asked the Assistant United States Attorney regarding the options available in

---

other notebook contains the report of Special Agent Howard Brooks prepared in conjunction with the tax investigation of Defendant Mann.

light of the January 4, 1994 trial date.[5] The Assistant United States Attorney indicated that he had sought

---

[5] This multi-defendant, multi-count cause is extremely complex and has a convoluted history involving superseding indictments and a multitude of motions, including two defendants' motions to dismiss the cause for prosecutorial delay. The original indictment issued on September 13, 1991, under cause number A-91-CR-132, indicted Defendants Gallaher, Moore, Alsup, and Christensen. On November 18, 1991, Judge Garcia set the cause for trial on April 12, 1992. The cause was transferred to this Court and on March 16, 1992, and this Court set the cause for trial on July 6, 1992. On April 7, 1992, the government filed a superseding indictment adding Defendant Mann and a conspiracy count. On May 13, 1992, this Court reset the trial for August 17, 1992. On August 5, 1992, the government dismissed the cause.

The Government filed a new indictment against Defendant Mann under cause number A-92-CR-129 on August 14, 1992. The Court made trial settings in this cause of November 16, 1992; March 29, 1993; July 5, 1993; and July 6, 1993. On each occasion, the government advised the Court it was in the process of additional investigation and was pursuing a superseding indictment. Counsel for Defendant Mann alleged he needed six months to prepare for trial.

On June 30, 1993, a week after the Court set the July 6 trial date, the Government did file a superseding indictment against all five Defendants now before the Court. Based on counsels' representation in a September 24, 1993 pretrial motions hearing, the Court set this cause for trial on January 4, 1994.

The government and defense counsel have represented to the Court trial of the cause will take three to five months. The Court, despite a heavy criminal docket and Speedy Trial Act concerns on several causes, has blocked a period of time for trial of this cause that is mutually acceptable to all involved. The government and all Defendants have had ample notice of the January 4 trial date and have all agreed to it. The Court has made every effort to keep the cause on schedule by scheduling frequent pretrial motions hearings.

counsel from the appellate section of the Justice Department and was advised there was no interlocutory or expedited appellate procedure available, and the Court's options were contempt proceedings or dismissal of the cause. With either of these alternatives, the government would have the right to appeal, but no decision would be reached before January 4, 1994.

Late the afternoon of December 17, 1993, the Court received a letter from the Assistant United States Attorney in which he stated the following:

> It occurred to the undersigned after the hearing today that only Defendant Moore had filed a motion to discover an agent report and that Moore's motion relates only to the portion of Special Agent Mazur's report that was previously revealed to Moore's attorney (I note that the motion refers to a single government "trial notebook"). I do not believe that the other defendants have pending motions for discovery of any agent report.

Also enclosed with the letter was a draft protective order relating only to Defendant Moore and Special Agent Mazur's notebook. The Assistant United States Attorney again asserted, however, that the government would not make disclosure and would seek appellate review of the Court's ruling. To stay on schedule, the Assistant United States Attorney suggested that the trial could proceed concurrently with appellate review of the merits.[6]

---

[6] The Assistant United States Attorney asserts that if an appellate ruling against the government is made before the conclusion of the trial, the government would immediately provide

II. Analysis

The government now argues the work-product doctrine and its exceptions do not govern discovery of case agents' reports in federal criminal cases because Federal Rule of Criminal Procedure 16(a)(2) specifically exempts the reports from disclosure.[7] In support of this argument, the government relies on one case that directly addresses Rule 16(a)(2), *United States v. Penix*, 516 F. Supp. 248 (W.D. Okla. 1981), and two federal civil litigation cases, *Shields v. Strum, Ruger & Co.*, 864 F.2d 379 (5th Cir. 1989), and *United States v. American Tel. & Tel. Co.*, 642 F.2d 1285 (D.C. Cir. 1980).

It is well-established that the work-product doctrine applies to criminal as well as civil litigation. *See United States v. Nobles*, 422 U.S. 225, 236-239, 95 S.Ct. 2160, 2169-2171 (1975). Further, the privilege derived from the doctrine is not absolute and can be waived. *Id.*

The government, however, contends the work-product doctrine does not apply in criminal cases to work-

---

defense counsel with the report in question; if the ruling is in the government's favor, the Defendants would have suffered no harm. Trying a multi-month case under these circumstances is akin to hungry children finding Easter eggs in June.

[7] Federal Rule of Criminal Procedure 16(a)(2) states:

> [T]his rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government or other government agents in connection with the investigation or prosecution of the case, or of statements made by government witnesses or prospective government witnesses except as provided in 18 U.S.C. § 3500.

product protected under Rule 16(a)(2), and cites *Penix* to support its contention. In *Penix*, an Oklahoma district court held, despite a disclosure of the prosecution's work product to third parties that might have waived any work-product privilege, pretrial disclosure of the government's entire case file was exempted under Rule 16(a)(2). The court stated no factual basis for the ruling and provided no legal analysis other than the movant presented no authority to the contrary.[8]

This Court does not find *Penix* to be persuasive authority in this case. Without benefit of factual background and legal analysis, the Court declines to accept *Penix* for a general rule that a disclosure does not result in the government's waiver of work product described in Rule 16(a)(2). Further, the Court notes an important factual difference between *Penix* and this cause – the disclosure in *Penix* was to third parties, not adversaries as in the cause now before this Court. Under general work-product doctrine, whether disclosure to a third party waives the privilege is a factually based determination. Additionally, the Court is bound under the Supreme Court's holding in *Nobles* to apply work-product doctrine to criminal litigation.[9] The Court is aware of no Supreme

---

[8] As the government points out in its motion for reconsideration, Defendant Moore has provided no legal authority to support his argument that the government waived any work-product privilege by showing the notebooks to the Defendants.

[9] In *Nobles*, the Court stated: "Although the work-product doctrine most frequently is asserted as a bar to discover [sic] in civil litigation, its role in assuring the proper functioning of the criminal justice system is even more vital." 422 U.S. at 238, 95 S.Ct. at 2170.

Court case or case from this Circuit that carves an exemption from the work-product doctrine for Rule 16(a)(2) materials.

The government also relies on cases in federal civil litigation where the work-product privilege has withstood waiver arguments. However, these cases base their reasoning on judicially compelled disclosure and disclosure to third parties, not adversaries. *See Shields*, 864 F.2d at 382 (compelled disclosure of privileged work-product despite objection in one court does not waive privilege for same work-product before another court); *American Tel. & Tel.*, 642 F.2d at 1299-1300 (disclosure to a third party with a common interest against a common adversary does not waive the work-product privilege).

"The purpose of the work-product doctrine is to protect information against opposing parties, rather than against all others outside a particular confidential relationship, in order to encourage effective trial preparation." *American Tel. & Tel. Co.*, 642 F.2d at 1299. Therefore, while a showing of voluntary disclosure to a third person is generally sufficient to show waiver of the attorney-client privilege, it will not suffice in itself for waiver of the work-product privilege. *Id.* As long as the transferor and the transferee have common interests on a particular issue against a common adversary, disclosure will not waive the privilege. *Id.*

Absent this common interest between transferor and transferee, however, the rationale behind the protection does not apply. *See, e.g., In re Subpoenas Duces Tecum*, 738 F.2d 1367 (D.C. Cir. 1984) (corporation that voluntarily disclosed material to SEC to convince SEC that formal

investigation not warranted could not later assert protection of the same documents under work-product privilege against different adversaries on the same matters disclosed to the SEC). When a party makes disclosure of documents to others with an actual intention that an opposing party may see the documents, the party who made the disclosure should not subsequently be able to claim the protection of the work-product doctrine. *In re Chrysler Motors Corp. Overnight Evaluation Program Litig.*, 860 F.2d 844 (8th Cir. 1988); *In re Doe*, 662 F.2d 1073 (4th Cir. 1981), *cert. denied*, 455 U.S. 1000, 102 S.Ct. 1632 (1982); *American Standard, Inc. v. Bendix Corp*, 71 F.R.D. 443, 446 (W.D. Mo. 1976); *see also* 8 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2024, at 210 (1970 ed.) ("[D]isclosure of a document to third person does not waive the work-product immunity unless it has substantially increased the opportunities for potential adversaries to obtain the information.")

In this cause, the Assistant United States Attorney has twice admitted in open court the government voluntarily provided its adversaries, the Defendants, with access to a compilation of documents. The government now contends the documents disclosed comprised Special Agent Mazur's report. Therefore, for the first time, there exists a need for an evidentiary hearing to determine what was made available to whom.

Although the Federal Rules of Criminal Procedure do exempt case agents reports and other government work product from disclosure, this Court finds no persuasive authority that this exemption is absolute. The government's disclosure was inconsistent with the purpose of the work-product privilege, to maintain secrecy in trial

preparations against opponents. Further, it is nonsensical and an inefficient use of time in a complex case involving thousands of documents to require the Defendants to go to the United States Attorney's office to read and make notes from documents the government has voluntarily shown the Defendants, rather than simply provide the Defendants a copy subject to a protective order.

Accordingly, this Court finds the government waived its work-product privilege with regard to the documents disclosed to the Defendants and must produce the documents for inspection and copying, subject to the protective order set forth below.

III. Conclusion

When the Court orally denied the government's motion to reconsider, the Assistant United States Attorney provided the Court with notice that the government would respectfully decline to produce the documents to the Defendants and would, therefore, intentionally refuse to comply with this Court's orders.[10] The government, as admitted in open court on December 17, 1993, has deliberately forced the Court to either dismiss the cause or hold counsel in contempt for failing to comply with Court orders. While the Court is tempted to dismiss under the circumstances, it will not do so and enters the following orders:

---

[10] The Court first ordered disclosure by order signed November 23, 1993. The Court orally ordered disclosure on December 17, 1993, and formally enters that disclosure order today.

IT IS ORDERED that the government's "Motion for Reconsideration of Order Directing Disclosure of Special Agents' Report" is DENIED and copies of the documents the government admits have been disclosed to defense counsel be made available to defense counsel on or before December 28, 1993, at 1:00 p.m. The defense counsel receiving copies of the documents shall, at the time of receipt of the documents, execute a document evidencing receipt of the documents. The Defendants and their counsel are instructed that the information contained in the documents is to be used solely for the purpose of preparation and trial of this litigation and for no other purpose whatsoever. None of the information contained in the documents is to be disclosed to any third party or person without order of this Court. Any individuals assisting defense counsel in the preparation and trial of the case are bound by this protective order, and counsel is ordered to so instruct any person assisting in the defense of any client. The documents and any information contained in them is not to be reproduced or copied in any manner. The documents are to be returned to the United States Attorney's office upon final judgment of the cause.

IT IS FURTHER ORDERED that an evidentiary hearing is set for December 28, 1993, at 1:00 p.m., in which the government shall establish by appropriate evidence the specific documents that have not been disclosed to counsel and, therefore, that the government objects to disclosing to the Defendants. IT IS FURTHER ORDERED that the Assistant United States Attorney report to the Court at that time what documents have been disclosed to defense counsel in compliance with this order.

SIGNED this the 20th day of December 1993.

/s/ Sam Sparks
SAM SPARKS
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UNITED STATES OF AMERICA, Plaintiff,	§	NO. A 92 CR 129 (1-5) SS
vs.	§	
PETER KINIMONTH GALLAHER, WILLIAM MARVIN MOORE, JULIAN CLIFFORD ALSUP, CHARLES MARCH CHRISTENSEN, JAMES SCOTT MANN, III, Defendants.	§	

ORDER

(Filed Dec. 29, 1993)

On December 28, 1993, the Court held an evidentiary hearing to determine what portions, if any, of documents designated as special agents, reports had been voluntarily disclosed by the government to the Defendants and which Defendants had received the disclosure. The need for this hearing stems from an issue that has been before this Court in some form since September 1993, as outlined in the Court's order signed December 20, 1993: Whether the government must now produce special agents' reports to the Defendants for inspection and copying when the documents were previously voluntarily disclosed to the Defendants for inspection without limitation, save verbatim copying. The Court ruled, for the reasons set forth in its December 20, 1993 order, that the documents must be produced to the Defendants for

inspection and copying. The Court, having heard the evidence presented by the government and defense counsel in the evidentiary hearing, affirms the ruling as expanded by this order and enters the following findings and order:

I. Background

This case has a long and tortured history. The original indictment issued on September 13, 1991 under cause number A-91-CR-132 and indicted Defendants Gallaher, Moore, Alsup, and Christensen. On November 18, 1991, Judge Garcia set the case for trial on April 12, 1992. The case was subsequently transferred to this Court in January 1992, and, at the request of the parties, the Court set a trial date of July 6, 1992. That trial date was continued as a result of a superseding indictment filed on April 7, 1992, which added Defendant Mann. On May 13, 1992, the Court again set a trial date of August 17, 1992 and subsequently refused the government's request to continue the trial, noting the case was approaching one year on the docket. To avoid the August 17, 1992 trial date, the government dismissed the indictment in A-91-CR-132 on August 5, 1992. Approximately a week later, on August 14, 1993, the government obtained a new indictment against Defendant Mann in this cause. The Court made trial settings in the cause of November 16, 1992; March 29, 1993; July 5, 1993; and July 6, 1993. On these occasions, the government continued to advise the Court it was in the process of additional investigation and would be pursuing a superseding indictment. Defendant Mann had a substitution of counsel, and counsel for Defendant

Mann also requested additional time to prepare for trial.[1] On June 30, 1993, one week before the July 6, 1993 trial setting, the government again avoided trial by obtaining another superseding indictment, which again included the same five defendants before the Court in May 1992. In a pretrial hearing on September 24, 1993, the Court set this cause for trial on January 4, 1994. The government and defense counsel were all present and agreed to the date.

Because the government and defense counsel have represented to the Court that trial of the cause will take months, the Court, despite its heavy criminal docket and Speedy Trial Act concerns on several causes, blocked this mutually acceptable period of time to try this cause and has made every effort to meet the schedule by scheduling frequent pretrial hearings and rescheduling its docket. In these pretrial hearings the issue of whether the documents had to be produced was addressed several times. The chronology of motions, arguments, and rulings is set forth in the Court's December 20, 1993 order and the transcripts of the September 24, November 19, and December 17, 1993 hearings. Therefore, the Court will not restate the entire history in this order. However, the Court will briefly outline the pertinent dates and statements.

Defendant Moore raised the issue in a discovery motion, in which he specifically requested copies of the

---

[1] It was represented to the Court that Defendant Mann's substitution of counsel was necessary as a result of the government's intention to subpoena lawyers and/or records from Defendant Mann's original counsel.

"trial notebook" disclosed to him by the government. At the September 24, 1993 hearing, the Assistant United States Attorney stated that the "trial notebook" was a case agent's report and that, although he did not want to produce the report to the Defendants, "in an effort to get them in the case and to understand what we are doing I've let everybody look at it." *See* Sept. 24, 1992 Hearing Transcript, at 15. He stated further that he "put an end" to allowing access to the case agent's report when a law clerk began copying verbatim from the report. *Id.* at 16. Based on counsels' representations that there were no discovery problems and the government had been accommodating defense counsels' requests, the Court attempted to settle the dispute in a mutually satisfactory manner by dismissing Defendant Moore's motion without prejudice but allowing the Defendants to review the report previously disclosed at the government's offices. *Id.; see also* Court's Sept. 27, 1993 Order.

Defendant Moore filed his motion to for inspection and copying of the documents on October 5, 1993, in which he reurged his argument that the government had waived any privilege related to the documents by its voluntary disclosure of the documents in question. In the November 19, 1993 pretrial hearing, the Assistant United States Attorney apprised the Court that actually two separate case agents' reports were now at issue. He stated however, "I'll be glad to give them what they have seen, if they will just show us – tell us what they have seen, we'll give them that part of it. That ought to solve it."[2] *See*

---

[2] At the December 20, 1993 hearing, the Assistant United States Attorney stated the "them" he was referring to in the

Nov. 19, 1993 Hearing Transcript, at 20. The Court granted Defendant Moore's motion and ordered the government to produce the documents in question. *See* Nov. 23, 1993 Order; *see also* Court's Dec. 20, 1993 Order, at 3-4.

Upon the Court's oral ruling granting the motion, the government reurged its concern about the sensitive and confidential nature of information regarding third parties contained in the documents. The Court, therefore, instructed the government to present the notebooks to the Court for *in camera* inspection with a list or designation of the portions containing sensitive information so the Court could determine which portions, if any, should be redacted and what type of protective order should be issued. *See Id.*

The government presented the notebooks to the Court on December 10, 1993, a week before the final pretrial motions hearing set in the cause. At that time, the government represented that providing the Court with the requested list or designation was an impossible task because much of the information was closely interrelated and intertwined. The Court, therefore, requested the Assistant United States Attorney to draft an appropriate protective order to be entered at the time of disclosure. The Assistant United States Attorney indicated he would do so.

However, also on December 10, 1993, the government filed a motion requesting the Court to reconsider its

---

statement was limited to Defendant Moore and his counsel. However, the Court understood "them" to relate to all defense counsel.

previous orders directing disclosure of the special agents' reports. At the hearing on December 17, 1993, the government again represented that attorneys for the Defendants were given the opportunity to see the reports and reviewed them. *See* Dec. 17, 1993 Hearing Transcript, at 27-28. However, when the Court overruled the Government's motion to reconsider, the Assistant United States Attorney stated he was forced to respectfully decline to comply with the Court's order. *See id.* at 26; *see also* Court's Dec. 20, 1993 Order, at 5-7.

Subsequently, a letter from the Assistant United States Attorney, delivered to the Court late the afternoon of December 17, 1993, raised questions of which documents had been disclosed and which Defendants were entitled to disclosure. See Court Exh. 1 (Letter from Blankinship to Sparks, Dec. 17, 1993). Therefore, the Court determined a need existed for an evidentiary hearing to determine what documents had been previously disclosed and which Defendants had received the disclosure. The Court, in an effort to keep the trial date on schedule despite the government's stated intention not to comply with the Court's order, set the hearing for December 28, 1993.

II. The Evidentiary Hearing

Although the hearing lasted several hours and involved testimony from one special agent, the Assistant United States Attorney, and one defense counsel, the Court finds the testimony of the Assistant United States Attorney to be dispositive of the issue. The Assistant

United States Attorney did not dispute that the government had provided defense counsel with access to the documents. In fact, the Assistant United States Attorney testified that counsel for the Defendants all had access to one or both of the case agents' reports, or reviewed one or both of the case agents' reports.[3] The Assistant United States Attorney argued however, that with the exception of counsel for Defendant Gallaher, the access to the notebooks was provided before the indictment in this cause was issued; defense counsel had not been allowed access to the documents since the June 1993 indictment was issued. Defendant Gallaher's counsel, who became involved in the cause when the latest indictment was issued, was provided with an opportunity to view the documents to assist him assessing the case against his client. However, as the Court noted above, the dismissal and subsequent reindictment was a tactic employed by the government to avoid a trial date. The Court will not allow this tactic to be used to preclude the Defendants from inspecting and copying the same documents shown

---

[3] The agents, reports were marked as Court exhibits during the evidentiary hearing. Court Exhibit 3 is Special Agent Walter Mazur's report prepared in conjunction with his investigation of the five Defendants. Court Exhibit 4 is Special Agent Howard Brooks's report prepared in conjunction with the tax investigation of Defendant Mann.

The Assistant United States Attorney testified that either current or previous counsel for Defendant's Gallaher, Moore, and Mann had been provided access to both reports. Defendant Christensen's counsel had reviewed Special Agent Mazur's report. The Assistant United States Attorney did not recall what Defendant Alsup's attorney had reviewed. However, Defendant Alsup was severed from this cause by oral order issued in the December 17, 1993 pretrial motions hearing.

to them by the government in the preceding cause number.

The Assistant United States Attorney also argued that because Defendant Moore was the only defendant who actually filed a motion requesting the documents, he is the only Defendant entitled to the documents. The Court finds this argument to be without merit in this complex, multi-defendant, multi-charge cause covering an extended period of time and involving two conspiracy counts charging all five defendants.[4] One or both of the notebooks containing the documents were made available to defense counsel for all Defendants; in a case of this nature, it is inefficient and nonsensical to limit the disclosure to only the Defendant filing a formal motion.[5]

The Assistant United States Attorney reurged his argument that work-product doctrine does not apply to

---

[4] The current indictment contains thirty-nine counts, which include allegations regarding the operation of savings and loan institutions, as well as conspiracy and tax violations. The charges stem from acts beginning in 1982; the government has conceded the statute of limitations has run on one of acts charged in one of the conspiracies. *See* Government's Response to Motion of Defendant Christensen to Dismiss Count One for Failure to Comply with the Statute of Limitations, at 3. The government has already provided approximately 6000 pages of documents and an additional 6000 pages of deposition testimony to each defendant. *See* Dec. 17, 1993 Hearing Transcript, at 32. The magnitude of document involved in this cause underscores the importance of the documents previously disclosed to defense counsel.

[5] The Court notes that Defendant Christensen has filed a motion, albeit past the Court's deadline, requesting disclosure of the documents.

case agents' reports, which are exempt from disclosure under Federal Rule of Criminal Procedure 16(a)(2). The Court, in its December 20 order, set forth the legal basis for requiring disclosure in this case. See Dec. 20, 1993 Order, at 7-11. During the evidentiary hearing, the government offered no additional authority or analysis other than that presented in its original motion to reconsider.[6] Based on the Assistant United States Attorney's testimony that he had previously provided all defense counsel with access to one or both of the reports, the Court affirms its order of disclosure, for the reasons set forth on pages seven through eleven of the Court's December 20, 1993 order.

In addition to the legal basis for the Court's order of disclosure, the Court believes notions of fairness essential to criminal justice compel the same result. The government has represented that it has a liberal discovery policy and that it has made every effort to accommodate appropriate discovery requests of defense counsel. By its own admission, the government allowed cases agents' reports, normally exempted from disclosure by Federal Rule of Criminal Procedure 16(a), to be reviewed by defense counsel. The government has admitted it allowed counsel to take notes from the documents without limitation, provided the notes were not verbatim copies.[7] The

---

[6] The government made no effort to address the Supreme Court's holding in *United States v. Nobles*, 422 U.S. 225, 236-239 (1975) (work-product doctrine applies to criminal litigation and privilege derived from doctrine may be waived).

[7] The Court is unsure of the degree of copious note-taking required to cross the line to verbatim copying, much less how such a rule could be objectively applied.

government has represented this practice was allowed to apprise defense counsel of the strength of the government's case in an effort to facilitate plea negotiations. However, it appears that once the government determined a Defendant would not plead guilty, the previously accessible documents were withheld.

The Court believes such a practice to be contrary to the notion of fairness essential to attaining justice in criminal trials. Defendants are entitled to understand the charges against them and to know the government's case against them before trial. If the government voluntarily chooses to provide defendants with information, despite its privileged nature, the government may not withhold the information as punishment for not pleading guilty. Such a practice is akin to trial by ambush or ploy, rather than the fair trial to which all defendants are entitled.

Further, the Court has reviewed the documents in question. The information at issue is of the type appropriately disclosed to defendants in some form. The Court found no information contained in the documents, and the government has not directed the Court's attention to any information in the documents, that would prejudice the government's right to a fair trial.[8]

---

[8] At the evidentiary hearing, the Assistant United States Attorney contended the agents' thought processes are contained in the reports and this disclosure would allow the Defendants to "adapt" their testimony. Yet, the agents met with defense counsel, at times for hours and often without government counsel's presence, to show defense counsel the strength of the government's case. Additionally, the Defendants will have heard all the evidence the government intends to offer before testifying themselves.

III. Conclusion

The Court has made every effort to bring this cause to trial. Once again, however, the Court and the parties are faced with the possibility of delay as a result of the government's actions. This cause has been pending in some fashion since September 1991. The government has deliberately delayed trial on pending indictments on July 6, 1992, by obtaining a superseding indictment; on August 17, 1992, by dismissing the pending indictment; on July 6, 1993, by obtaining another superseding indictment; and now, on January 4, 1994, by refusing to comply with this Court's orders and provide copies of documents previously disclosed to defense counsel. The Court does not have an indefinite amount of time to devote to scheduling and rescheduling a multi-month trial. The Court, to accommodate the January 4, 1993 trial date in this cause, has already had to address Speedy Trial Act concerns on several other causes in an effort to avoid dismissals.[9] If the government refuses to comply with this order and the Court's December 20, 1993 order, the Court will be forced to choose between holding the government's attorneys in

---

[9] The Court recently completed two lengthy criminal trials: *United States v. Moeller, et al.*, A-91-CR-001, and *United States v. Craven Laboratories, Inc., et al.*, A-92-CR-152. *Moeller*, which was scheduled for six weeks, began on September 20, 1993, and was completed in four weeks. Craven Labs was scheduled for four weeks and began on November 29, 1993.

In addition to this cause, the following causes are set for docket call in this Court on January 4, 1993: *United States v. Ball*, A-93-CR-43; *United States v. Imbert*, A-92-CR-66(3); *United States v. Harper*, A-93-CR-103; *United States v. Rosales & Schreiber*, A-93-CR-144; *United States v. Levine*, A-93-CR-145; *United States v. Rogers*, A-93-CR-147; *United States v. Rodriguez*, A-93-CR-149.

contempt and dismissing the cause. However, the Court believes trial counsels' refusal to comply with this Court's order is the result of restraints placed upon them by others, and, therefore, contempt would be inappropriate in this case. See Nov. 19, 1993 Hearing Transcript, at 21-22. Further, because of the tight schedule created in the Court's docket by blocking the time for trial of this very cause, the Court would not be able to schedule a new trial date in compliance with the Speedy Trial Act if the currently scheduled trial date is passed. Therefore, the Court believes dismissal of the cause is the only viable option available to the Court. Accordingly, the Court enters the following order:

IT IS ORDERED that the government deliver both special agents' reports contained in Court Exhibits 3 and 4 to defense counsel on or before Thursday, December 30, 1993, at 5:00 p.m., subject to the protective order set forth in the Court's December 20, 1993 order. As indicated in open court, if the government fails to comply with this order, the Court will dismiss this cause of action on Monday, January 3, 1993.

SIGNED this the 29th day of December 1993.

/s/ Sam Sparks
SAM SPARKS
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UNITED STATES OF AMERICA	§	
	§	
VS.	§	
	§	**NO. A 92 CR 129(1-3,5) SS**
JAMES SCOTT MANN, III, PETER KININMONTH GALLAHER, WILLIAM MARVIN MOORE, and CHARLES MARCH CHRISTENSEN	§	

ORDER

(Filed Jan. 3, 1994)

BE IT REMEMBERED on this the 3rd day of January 1994 the "Government's Response to Order of December 29, 1993" was presented to and reviewed by the undersigned and, recalling the many docket calls relating to trial settings in this case and its predecessor, the Court is confident the transcripts of those hearings will establish the representations of government counsel as to various estimates of time trial and, further, establish that the government has never been ready for trial to date, notwithstanding the original indictment in September 1991. Perhaps, if the history of this case did not included [sic] trial settings of July 6, 1992; August 17, 1992; July 6, 1993; and January 4, 1994 where intentional conduct of the government prevented trial by superseding indictments and dismissal of an indictment, the appropriate remedy of the government's refusal to comply with the order of

this Court would be contempt rather than dismissal. However, the courtroom is supposed to be a sanctuary where *all* parties receive impartial justice. These Defendants have now been under indictment and Government prosecution since at least September 1991 without the benefit of a trial. Some factual allegations in the indictment are now twelve years old. Now, the government prevents trial by refusal to comply with an order of disclosure, with appropriate protective order, of documents – agents reports that were freely permitted review by Defendants and their counsel, as admitted in open court and corroborated by the letter attached to the Government's response. *See* Letter from Blankinship to Sparks, et al., July 23, 1992, at 2 ("[O]ne of Mr. Mann's attorneys, has already reviewed the Special Agent's report relating to the new tax charges. Discovery relating to the new charges, in part, is in process, because the subject matter of the pending indictment is intertwined with the new charges. Liberal discovery will continue uninterrupted.")

This Court is most reluctant to dismiss criminal charges brought by indictment and does not do so lightly. However, the Court cannot condone the government's conduct. Dismissal is the appropriate remedy under these circumstances.

> IT IS ORDERED that the indictment in the above-styled cause is DISMISSED for the refusal of the United States Attorney to comply with the order of this Court *and* the government's conduct in preventing trial in this cause.

SIGNED this the 3rd day of January 1994.

/s/ Sam Sparks
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-50082

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

versus

JAMES SCOTT MANN, III,
PETER K. GALLAHER,
WILLIAM M. MOORE, JULIAN C.
ALSUP and CHARLES CHRISTENSEN,

Defendants-Appellees.

Appeal from the United States District Court for the
Western District of Texas

ON SUGGESTIONS FOR REHEARING EN BANC

(Opinion 8/3/95, 5 Cir., 1995, ___ F.3d ___)

(Sept. 21, 1995)

Before VAN GRAAFEILAND*, JOLLY and WIENER, Circuit Judges.

PER CURIAM:

(X) Treating the Suggestions for Rehearing En Banc as Petitions for Panel Rehearing, the Petitions for Panel

---

*Circuit Judge of the Second Circuit, sitting by designation.

Rehearing are DENIED. No member of the panel nor Judge in regular active service of the Court having requested that the Court be polled on rehearing en banc (FRAP and Local Rule 35), the Suggestions for Rehearing En Banc are DENIED.

( ) Treating the Suggestions for Rehearing En Banc as Petitions for Panel Rehearing, the Petitions for Panel Rehearing are DENIED. The Court having been polled at the request of one of the members of the court and a majority of the Judges who are in regular active service not having voted in favor (FRAP and Local Rule 35), the Suggestions for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Illegible Jolly
United States Circuit Judge

REHG-17

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE